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IN THE

UNITED STATES SUPREME COURT

1968

[redacted] 118

SAM VINCE AND PATRINA VINCE,
Defendants-Appellants,

versus

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Petition of SAM VINCE AND PATRINA VINCE for writ of certiorari under RULE 23, alternatively for writ with stay order under RULE 31, in order that the Supreme Court might review:

JUDGMENT ENTERED MAY 2, 1968
Docket No. 25448 of the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT, in
above captioned and titled cause.

RESPECTFULLY SUBMITTED
SAM VINCE AND PATRINA VINCE

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ORTLIEB PRESS BATON ROUGE

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above captioned and titled cause.

Defendants-Appellants submit the following in compliance with sub-sections of RULE 23:

1. (a) The opinion in the District Court is reported in 270 F. Supp. 591. Unreported opinion of the Fifth Circuit is attached.

1. (b) JURISDICTION IS INVOKED BECAUSE OF *EMPHATIC* CONFLICT WITH UNITED STATES v. YAZELL, 382 U.S. 341, 86 S. Ct. 500 and LEGGETT v. HUMPHREYS, 62 U.S. 66, 21 How. 66, 16 L. Ed. 50, 54, and partial conflict with AUSTAD v. UNITED STATES, (CCA 9th-1967) 386 F. 2d 147.

1. (b) (i) Judgment was entered May 2, 1968.

1. (b) (iii) 28 USC 1254 (1) and 28 USC 1651 (a) authorize review by Supreme Court.

1. (c) THE FOLLOWING QUESTIONS ARE PRESENTED FOR REVIEW:

(#1) Where neither District nor Appellate Court find *any* danger to the interests of the National Government, if state law governing SBA loan transactions were followed, is YAZELL'S directive (86 S. Ct. 500, 507) followed when Federal Courts override state law?

(#2) Can an Appellate Court justify compliance with YAZELL, supra, by *unsupported* allegation that parties "waived" the provisions of Louisiana law?

(#3) Is the mandate of LEGGETT v. HUMPHREYS, 16 L. Ed. 50, 54, that

> "... sureties are never held responsible beyond the clear and absolute terms and meanings of their undertakings. Presumptions or equities are never allowed to enlarge or in any degree change their legal obligations"

followed and satisfied

A) Where *neither* guaranties *nor* loan documents specify *either* express *or* implied waiver of Louisiana Civil Code Articles *3057* and/or *3061*

and

B) Where the guaranty form utilized by SBA made the guaranty expressly *SUBJECT TO* the provisions of the loan documents (Transcript 13, 29) and limited exercise of power over collateral ". . . to the extent permitted by law."? (Transcript 15, 31)

(#4) Where SBA has *stipulated* it received $42,243.86 of bona fide accounts receivable of debtor, and admitted these became worthless and prescribed through SBA's failure to administer—can SBA nevertheless hold guarantors liable *without* offset credit in the amount of SBA's claim?

(#5) Where neither guaranty nor loan documents imposed duty on guarantors to administer receivables, and where, under Articles 694 and 698 of the Louisiana Code of Civil Procedure, guarantors were without legal authorization to administer, should they be penalized with this $42,243.86 loss?

(#6) Is the provision in the guaranty limiting liability of SBA to cases of willful act, or willful failure to act

". . . by reason of any deterioration, waste, or loss by fire, theft, or other-

wise of any of the collateral . . ." (Transcript 17, 32)

applicable to *intangible* security of accounts receivable (as the District Court says in opinion), or applicable only to security of the type which can have *physical* depreciation (as the Ninth Circuit decided in *Austad*, supra, 386 F. 2d 147, 150)?

(#7) Where SBA was free to proceed under 28 USCA 2408, 2412, free of costs, should guarantors be liable for $4,000.00 of administrative expenses needlessly incurred (and not representing any advance to debtor) where guarantors neither approved nor condoned these costs?

1. (e) A CONCISE STATEMENT OF THE CASE IS AS FOLLOWS:

1— On *April 3, 1958* Vince Mechanical Contractors, Inc. executed an assignment agreement with Louisiana National Bank (Exhibit A-3 at TR 63)

2— On *May 19, 1959* it executed supplemental assignment agreements. (Exhibits A-1 and A-2 at TR 53, 54)

3— On the same *May 19, 1959* the corporation borrowed $35,000.00 on a note (Exhibit D at TR 20) which incorporated terms of the assignment agreements. (TR 21)

(NOTE: Because the $75,000 note is now paid, facts are limited to the remaining $35,000.00 note)

4— Also, on *May 29, 1960* defendants-appellants executed their 'guaranty' (Exhibit E at TR 27)

5— On July 29, 1960 the Louisiana National Bank assigned the note, assignment agreements, and guaranty to SBA, *together with five (5) accounts receivable of debtor in the amount of FORTY TWO THOUSAND TWO HUNDRED FORTY THREE AND 86/100 ($42,243.86) DOLLARS!* (TR 67, 70-74)

These five (5) accounts receivable are the 'heart' of the issue — *if* appellants were credited with this value (they were not), then the $42,243. 86 would exceed by far the $21,129.30 alleged principal and $7,191.54 interest under the judgment (TR 129).

It is EXTREMELY pertinent to note item 8 of the Joint Stipulation (TR 105) that

> "All parties agree that the five (5) accounts receivable . . . *were bona fide accounts presently existing in the correct amounts as stated, at the time EXHIBIT A-5 was executed.*". (italics ours)

i.e., that $42,243.86 represents the correct amount of these *bona fide accounts* as of the July 29th, 1960 assignment to SBA (TR 67).

6— Vince Mechanical Contractors, Inc. filed bankruptcy on *November 1, 1960.*

7— SBA filed a secured proof of claim on the accounts.

8— The accounts were never administered by trustee. The latter made informal disclaimer in filing his final account (with notice to SBA) on *May 12, 1962*. His account was approved and trustee discharged on *June 12, 1962*.

((items 9 thru 14 of the Joint Stipulation TR 105-6; also TR 94 thru 100))

9— On *April 29, 1963* the United States filed suit against defendants-appellants (TR 1) — jurisdiction based on this being a civil action brought by the United States of America. 28 USC 1345

10— In *August of 1964* (for the *first* time) defendants-appellants learned through discovery (TR 91, 93) that SBA had NOT collected the receivables through error of believing the bankruptcy court had

". . . NOT TO DATE ABANDONED THE SAID ACCOUNTS . . ."

and that

". . . the said accounts were presumably still within the exclusive jurisdiction of the said Court, and, thus, *insulated from any collection activity of plaintiff*."

ACCORDINGLY, the five (5) accounts "prescribed" at the end of July 1963. LCC-Art. *3538*. Assuming 11 USC 29 e would extend the prescriptive period 19 months and 12 days during pendency of the bankruptcy, would extend the period to *March 12, 1965*! Thus, they were definitively prescribed long *prior* to the District Court's decision of June 1967!

1. (h) IN DIRECT AND CONCISE ARGUMENT AMPLIFYING REASONS RELIED ON FOR WRIT, WE SUBMIT:

UNITED STATES v. YAZELL clearly and emphatically declared against any "federal interest" justifying overriding laws of the various States, in the case of SBA loans! However, *YAZELL* did prescribe the circumstances which could justify disregard, i.e.:

> "* * * where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." 86 S. Ct. 500, 507

Neither District *nor* Appellate Court find *any* such circumstances here! Yet *YAZELL* is discreetly nullified under pretex of being followed, and, where *YAZELL* approves of SBA's own Manual, viz:

> "State laws vary as to the dominion a lender must exercise over *assigned accounts receivable* * * * In drafting servicing provisions * * * *counsel should carefully consider the applicable laws of the State* * * *" (italics ours) 86 S. Ct. 500, at 509-510 Note 35

this phase of *YAZELL* is literally bludgeoned to death!

Louisiana is unique among the states, in that we take our law from the French. In Louisiana, subrogation is NOT (as was described in *Newton* 336 F. 2d. 673, 677) based on " 'equities' and general principles of law", but rather a *cardinal* part of our legal system reflected in suretyship articles of our Civil Code.

As Prof. Leon D. Hubert, Jr. points out in 13 TULANE LAW REVIEW 519: "Guaranty" is not recognized in Louisiana! A contract of guaranty in Louisiana is equivalent to a contract of suretyship. *Brock v. First State Bank and Trust Company*, 187 La. 766, 175 So. 569 The two (2) pertinent Civil Code Articles are:

> *3037* The suretyship can not exceed what may be due by the debtor, *NOR BE CONTRACTED UNDER MORE ONEROUS CONDITIONS.*
>
> * * * * *
>
> The suretyship . . . which is contracted under more onerous conditions shall not be void *BUT SHALL BE REDUCED TO THE CONDITIONS OF THE PRINCIPAL OBLIGATION.* (Caps and italics ours)
>
> *3061* The surety is discharged when by the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety.

ACCORDINGLY, backed by a long line of jurisprudence, it is so settled in Louisiana that a surety is "discharged" if his right of subrogation is impaired by the creditor, that the District Court could cite not a *single Louisiana case* in support of the view:

> "* * * the disposition of these accounts receivable is unimportant insofar as a determination of defendants' liability to plaintiff on the notes in question in this suit is concerned." TR 119

This is certainly NOT and has NEVER been the law of Louisiana!

In appellate briefs we cited innumerable Louisiana cases! Herein we mention only *C.I.T. Corporation v. Rosenstock*, 205 So. 2d 81 (1968) to show the glaring conflict between the instant case and the latest expression from a Louisiana appellate court. Defendants-appellants would NEVER have received such adverse judgment in Louisiana state courts!

The Fifth Circuit indicates Louisiana law was "waived". Counsel would gladly accept contempt citation if any Jurist or law clerk on This Court can discover *express* waiver. To employ a law school expression: There is not a "weak, meek, peep" of language in *any* document that defendants-appellants "waived" either Article *3037* or *3061*!

Re any *implied* waiver based on the *subjective intent* of the parties *at the time of the agreements*, we concede the record is silent on this, but it would border on the fanciful to surmise that any party contemplated in advance the subsequent bankruptcy and error on the part of SBA in deeming the accounts insulated from collection activity.

We can say, however, that not a single document herein placed responsibility on defendants-appellants to administer security, and the government has never disclosed by what authority appellants could have administered these receivables, under the procedural limitations of Articles *694* and *698* of the Louisiana Code of Civil Procedure!

Re alleged *implied* waiver by *terms of documents*, the District Court relied on GUARANTY provisions which, in essence, limited liability of SBA to "Willful act or willful failure to act" and gave SBA ". . . full power, in its uncontrolled discretion" (TR 29-30, 32, 120, 122) to release collateral!

The first provision is inapplicable to *intangible* security by AUSTAD v. UNITED STATES, 386 F. 2d 147, 150. Even though applicable, such result requires DELETING two (2) important guaranty provisions:

a) that made the grant of power (TR 29)

> ". . . SUBJECT TO THE PROVISIONS OF ANY AGREEMENT BETWEEN DEBTOR . . . AND (SBA)"

and

b) limited the exercise of power (TR 31)

> "* * * SUCH POWERS TO BE EXERCISED ONLY TO THE EXTENT PERMITTED BY LAW."

Placement of these provisions immediately *before* and *after*, respectively, the enumeration of powers, conclusively shows that the "guaranty form" was to be correlated, interrelated, amended and/or modified in reference to specific loans in the different locals. Otherwise, how could such "printed forms" be used throughout the United States without qualifying language incorporating specific agreements on each loan?

More emphatically, THIS DISREGARDS LCC-ART. *3037*! Specifically, the provisions:

a) limiting SBA's liability for willful act or willful failure to act

b) granting SBA *uncontrolled discretion* over collateral, and,

c) authorizing exchange or substitution of collateral *whe-*

ther or not the exchanged-substituted collateral was of the same value

cannot be found in the NOTES or any documents incorporated therewith — on which the District Court should have determined liabilities, to accord with *3037*! If waiver of *3037* can be inferred merely by signing a guaranty with conditions more onerous than the principal obligation (as the Fifth Circuit implies), LCC-ART. *3037* COULD *NEVER* BECOME OPERATIVE!

Re the $4,000.00 of administrative costs that defendants-appellants were charged, in the amount claimed as the balance due, we have been unable to discover any provision in the guaranty authorizing assessment of these charges against guarantors. Neither District nor Appellate Court disclose any guaranty provision relied on.

The mandate of LEGGETT v. HUMPHREYS, 16 L. Ed. 50, 54, we submit, has been torn to shreds. If the decision herein meets the test of "clear and absolute terms" devoid of presumptions, we have been unable to perceive it!

CONCLUSION

The decision below inflicts brutal hardship on appellants, who have lost life insurance, business properties and former home through this unfortunate SBA transaction (TR 42, 43, 48-49). Yet the government still seeks to recover an additional $30,000.00 BUT DENY APPELLANTS BENEFIT OF $42,000.00 of bona-fide collateral made worthless through its own fault!

One of the appellants herein (Patrina Vince) has already filed bankruptcy. Judgment against the other will do little more than add hardship.

We seek a rule that will benefit *both* SBA and sureties, viz: CLEAR 1) *duty* imposed on sureties to administer security, and 2) specific *authorization* to administer under the particular state law. We seek offset only to the amount of the government's claim!

YAZELL, supra, may ultimately be overruled or nullified. If so, such prerogative belongs exclusively to the United States Supreme Court. It is not for either a District or Appellate Court to refuse compliance with the latter's mandate.

In making this application to the Supreme Court, we have done all we can to afford opportunity for the Supreme Court to protect its decree.

We pray for a writ to issue, and for all other relief necessary.

1. (i) THERE IS APPENDED HERETO THE SHORT PER CURIAM OPINION OF THE COURT OF APPEALS:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25448

SAM VINCE AND PATRINA VINCE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 2, 1968.)

Before TUTTLE and SIMPSON, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: Appellants complain of a judgment against them as guarantors of a small loan made by the Small Business Administration to their corporation, Vince Mechanical Contractors, Inc. In substance, they attack the judgment on the ground that the trial court declined to consider their

assertion that the Small Business Administration improperly administered assigned accounts held as collateral. They say that Louisiana law requires that the broad power given by the guaranty instrument cannot exceed those powers actually granted in the promissory note itself.

We agree with the trial court that the contract of guaranty ("suretyship" under Article 3037 of the Louisiana Code) does not place "more onerous conditions" upon the guarantors than those contracted by the debtor. To the extent that the conditions are more broadly stated in the guaranty agreement, we conclude that the guarantors waived, to such extent, the provisions of the codal sections involved.

Assuming that we are to apply Louisiana law, see *United States v. Yazell*, 382 U.S. 341, we find no Louisiana decisions limiting the power of such guarantors to waive the benefits of the statute.

The judgment is AFFIRMED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 2, 1968

Issued as Mandate:

CERTIFICATE

I certify that I have this date, by registered-air-mail (return receipts requested), forwarded a copy of the instant petition to each of the following:

(1) THE SOLICITOR GENERAL
Department of Justice
WASHINGTON, D. C. 20530

(2) MISS KATHLEEN RUDDELL
Assistant United States Attorney
500 St. Louis Street
NEW ORLEANS, Louisiana 70130

the latter, counsel of record for Plaintiff-Appellee in both the District Court and Court of Appeal.

BATON ROUGE, Louisiana, this 17th day of May, in the year 1968.

FRANZ JOSEPH BADDOCK (DI 3-9194)
406 Fidelity National Bank Building
BATON ROUGE, Louisiana 70801

SUPREME COURT, U. S.
FILED
JUN 21 1968
JOHN F. DAVIS, CLERK

No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1968

SAM VINCE and PATRINA VINCE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 118

SAM VINCE and PATRINA VINCE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States brought this action to recover from petitioners, as guarantors, the balance due (plus interest and costs) on two notes held by the Small Business Administration. The obligations underlying these notes were incurred in 1959, when Vince Mechanical Contractors, Inc. ("Mechanical"), obtained two loans from the Louisiana National Bank of Baton Rouge. As partial collateral Mechanical assigned five accounts receivable, worth $42,243.86, to the bank.

Under the terms of the note Mechanical was responsible for supervising, preserving, and protecting the collateral. The instrument assigning the accounts as collateral designated Mechanical as agent of the assignee for collection of all money due on the accounts.

Petitioners executed guaranty agreements in which they undertook the obligation of paying the balance due, plus interest and other sums payable on these notes, in the event of default by Mechanical. These guaranty agreements provided that petitioners' obligations "shall not be released, discharged or in any way affected, nor shall [they] have any rights or recourse against Bank, by reason of any action Bank may take" under its power to deal with the collateral.

Petitioners' specific undertaking as guarantors was stated to be that, in the event of default by the debtor,

> immediately upon the written demand of Bank, [they] will pay to Bank the amount due * * *. Bank shall not be required, prior to any such demand on, or payment by [petitioners], to make any demand upon or pursue or exhaust any of its rights or remedies with respect to any part of the collateral.

The Small Business Administration purchased a 90% participation in these notes, and on July 29, 1960, the guaranty agreements, together with all other items of collateral, including the five accounts receivable, were assigned to the Small Business Administration.

Mechanical defaulted on the notes and was later adjudged bankrupt. Petitioners defended the instant

suit on the ground that the SBA had never collected the accounts receivable, but instead allowed them to become uncollectible as time-barred, rendering a large amount of the total collateral worthless. They argued that the Louisiana Civil Code controlled and that, under Articles 3037 and 3061 of the Code (Pet. 8), the failure of the SBA to preserve and collect the collateral discharged them from their obligations under the guaranty agreement. In the alternative, petitioners argued that the original value of the accounts receivable should be considered a credit against the amount owed. The district court rejected these arguments, holding that petitioners' guaranty obligation was not conditioned on the continued value of the collateral, and, furthermore, that this was consistent with Articles 3037 and 3061 of the Louisiana Code. 270 F. Supp. at 594-595.

The court of appeals affirmed, *per curiam*, noting that the applicable Louisiana law was not violated by the guaranty agreement, and that, in any event, to the extent the guaranty agreement might be inconsistent with the protection afforded by state law, petitioners had waived the Code provisions they rely on.

DISCUSSION

1. Petitioners' position seems to be that the courts below failed to apply state law in this case, and that the decision, for that reason, is inconsistent with *United States* v. *Yazell*, 382 U.S. 341. Although it is doubtful that *Yazell* requires reference to state law in the instant case, that question is not presented since the court of appeals has in fact applied Louisi-

ana law.[1] It "assum[ed] that we are to apply Louisiana law" (Pet. App. 14) and referred solely to the law of that state. It concluded that the guaranty agreements were not inconsistent with the Louisiana Code provisions by imposing on the guarantors "more onerous conditions" than the debtor himself had contracted for. Moreover, to the extent that the conditions of the guaranty were "more broadly stated" than those of the underlying contract, the protection of Civil Code Article 3037 was found to have been waived by petitioners. The court found nothing in the statute or case law of Louisiana nullifying the capacity of guarantors like petitioners to waive the protection of these commercial statutes. While we do not suggest that there is substance to petitioners' argument that the Fifth Circuit misconstrued Louisiana law, this contention clearly does not warrant review by this Court. See, *e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 486-487; *National Fertilizer Association* v. *Bradley*, 301 U.S. 178, 181; *Wayne County Board* v.

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[1] *Yazell, supra,* involved a "custom-made, hand-tailored, specifically negotiated transaction" and involved applicability of a "peculiarly local" law regarding family property rights. Neither of these factors is present in this case—the contract was clearly a "form" contract and the law petitioner seeks to apply does not relate to an area of paramount state interest. In these circumstances, it would seem that federal law should be applied. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447; *United States* v. *Carson*, 372 F. 2d 429 (C.A. 6). These facts seem to bring this case closer to *D'Oench, Duhme*, which as the Court in *Yazell* expressly reiterated, presented an appropriate situation for applying a uniform federal standard. See 382 U.S. at 354. However, as pointed out above, this question is not actually presented by this case.

Great Lakes Steel Corp., 300 U.S. 29, 30, expressing the policy that the Court will adhere to the interpretation and construction of state statutes adopted by the lower federal courts.

2. In any event, the decision below is plainly correct. Petitioners assert that their guaranty agreement violated Article 3037 of the Louisiana Code by imposing conditions "more onerous" than the conditions of the notes. It should be noted, however, that none of the conditions of the guaranty which the petitioners allege to be "more onerous" (Pet. 10-11) forms the basis of this suit. Rather, the Small Business Administration is relying on its right to recover the balance due on the note, whether from the maker or the guarantor, without first realizing on the collateral, and this right is contained in *both* the principal obligation and the guaranty agreement. Therefore, regardless of collateral, the existence of the right to recover from the guarantor cannot be said to be more onerous in the guaranty agreement than in the principal obligation. Furthermore, even if we assume *arguendo* that the guaranty contained terms which differ from the conditions of the principal obligation (Pet. 10), by nevertheless signing the agreement the petitioners—as the court of appeals held—must be deemed to have waived whatever protection would otherwise have been afforded by the Louisiana Code Article 3037.[2]

Petitioners also assert that the failure of the Small

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[2] The validity of such a waiver is recognized by Louisiana Civil Code Article 11, which specifically enables individuals to renounce laws made in their favor and for their protection, except for laws relating to the preservation of public order or good morals.

Business Administration to collect the accounts receivable held as collateral falls within Article 3061 of the Louisiana Civil Code, which provides that the surety is discharged when the creditor does some act impairing the surety's right to be subrogated to the creditor's interest. Petitioners, by signing the guaranty agreement, made an unconditional promise to pay in the event the principal debtor defaulted. The agreement did not require the Small Business Administration to proceed against the collateral before demanding payment of petitioners. Thus, by signing the guaranty, petitioners in effect agreed to pay regardless of any subrogation right they might ultimately have respecting the collateral. Moreover, since Mechanical agreed to act as the agent of the assignee in collecting on the accounts, the failure to collect on the accounts initially rested with it, and not with the holder of the note. Petitioners knew in August 1964 that these accounts had not been collected; the statute of limitations did not expire until March 12, 1965 (Pet. 6). Petitioners should have paid their obligation under the guaranty, and then proceeded to collect the accounts receivable themselves. In light of petitioners' insistence on contesting their obligation as guarantors while the statute of limitations ran on the accounts receivable, they should not now be heard to suggest that an "act of the creditor" interferred with a subrogation right to which they were entitled. See *Austad* v. *United States*, 386 F. 2d 147 (C.A. 9).[3]

[3] Regarding petitioners' final point (Pet. 11)—their obligation to pay the costs—we point out that Louisiana Civil Code, Article 3040, provides that the surety's liability extends to costs.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1968.

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